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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 250.

BAUER-SMITH DREDGING CO., INC.,
Petitioner-Defendant Below,

vs.

ROY TULLY ET AL.,
Respondents-Plaintiffs Below.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, NINTH SUPREME JUDICIAL DISTRICT OF TEXAS.

BRIEF FOR RESPONDENTS, ROY TULLY ET AL., IN OPPOSITION.

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September 5, 1958.

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OPINIONS BELOW.

Petitioner removed this case to the United States District Court for the Eastern District of Texas at Beaumont. The United States District Court's opinion dated November 19, 1953, is unreported but is set out in Appendix to Peti-

tioner's Brief, Pages 51, 52. The Court held no Federal question was involved.

Judgment after trial before a jury was entered by the 60th Judicial District Court of Texas against Petitioner-Defendant (Appendix to Petitioner's Brief, Pages 5-25).

This judgment was affirmed by the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas. (Appendix to Petitioner's Brief, Pages 25-51) opinion reported in 305 S.W. 2d 805.

Petitioner filed Application for Writ of Error to the Supreme Court of Texas, which was refused on the ground that it presented no reversible error. Petitioner's Motion for Rehearing, which raised the jurisdictional point for the first time on appeal, was overruled on May 14, 1958 (Appendix to Petitioner's Brief, Page 50).

JURISDICTION.

Petitioner contends this Court has jurisdiction under 28 U.S.C. 1257 (3) on the grounds that a Federal dredging contractor is involved (Defendants' Original Exhibit 3).

Respondents would show that the alleged "Federal Question" and question of jurisdiction was not properly raised or presented under Texas Rules of Civil Procedure either in the trial or appellate court.[1]

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[1] "Rule 469 (c), Texas Rules of Civil Procedure, Requisites of Application for Writ of Error, Points of Error. The Points of Error relied upon, separately numbered, shall be stated in short form and without argument and be germane to some assignment of error in the Motion for New Trial in the trial court or otherwise saved in the statement of points as authorized by the rules, and likewise assigned as error in the Motion for Rehearing in the Court of Civil Appeals, * * *. If the ruling complained of originated in the Court of Civil Appeals, it must also be assigned as error in the Motion for Rehearing in said court."

A substantial Federal question must be raised in the correct manner at the proper point under State procedure. *Hulbert* v. *Chicago*, 202 U.S. 275, 26 S.Ct.R. 616. If this is not done the Supreme Court of the United States will decline to exercise jurisdiction. *Pennsylvania Railway Company* v. *Illinois Brick Company*, 297 U.S. 447, 462-3, 56 S.Ct.R. 556. The fact that the Federal question was properly raised before the trial court is not enough. The question must be pursued on appeal to higher state courts, and it must be pursued in the manner specified by the State Rules of Practice. *John* v. *Paullin*, 231 U.S. 583, 585, 34 S.Ct.R. 178. Where a Federal question is initially raised in a petition or assignment of errors filed in the highest state court, which refused to consider any issue not presented to the trial or intermediate appellate court, the jurisdictions of the Supreme Court cannot attach. *Bailey* v. *Anderson*, 326 U.S. 203, 206-7, 66 S.Ct.R. 66. Review is limited to the specific Federal questions which were raised in the state courts. *Whitney* v. *California*, 274 U.S. 357, 362-3, 47 S.Ct.R. 641; *Dewey* v. *Des Moines*, 173 U.S. 193, 197-8, 19 S.Ct.R. 379.

Petitioner-Defendant filed certain exceptions (Petitioner's Appendix, page 34); but the record on appeal did not show any action by the trial court on the exceptions and none was had (Opinion Court of Civil Appeals, Petitioner's Appendix, page 35). No plea to the jurisdiction of the State District Court was filed or presented. The only answer filed by Petitioner-Defendant was a general denial (Appendix this Brief page A1; Transcript page 20); Petitioner-Defendant likewise filed a cross-action against Plaintiffs to recover Five Thousand and no/100 ($5,000.00) Dollars allegedly expended by it to save plaintiffs' rice crop and to mitigate damages (Appendix this Brief, page A2).

Petitioner-Defendant requested Special Issues Nos. 40, 41, 42, 43, 44 and 45 (Petitioner's Appendix, Pages 20-22); the jury in answer to these issues found that Petitioner, Bauer-Smith Dredging Company, Inc., deposited material on July 18, 19 and 20 in a place on the Respondents' property not provided in its Federal contract for deposit of material (Opinion, Court of Civil Appeals, Petitioner's Appendix, Pages 37-38). The jury likewise found that Petitioner-Defendant negligently deposited material, which included spoil and salt water, in Respondents-Plaintiffs' fresh water canal where the plat attached to the Government contract provides: "No material shall be allowed to enter this canal". (Petitioner's Appendix, Page 16). Other findings of negligence are found in the opinion of the Court of Civil Appeals (Petitioner's Appendix, Page 35). The Court of Civil Appeals said: "All such findings are supported by the evidence." (Petitioner's Appendix, Page 37). Again, the Court of Civil Appeals said: "We think the evidence supports the findings of the jury that the Appellant was negligent in the performance of his contract and *exceeded the authority granted* (italics ours) and the directions given in its contract with the Government. It is noted that in none of its Points of Error on appeal does the Appellant complain of the sufficiency of the evidence in any way." (Petitioner's Appendix, Page 48). Again, the Court of Civil Appeals held: "The acts complained of were done in a negligent and willful manner, outside of the provisions and directions in the contract itself." (Petitioner's Appendix, Page 49). The only points of error presented on appeal are set out in the opinion of the Court of Civil Appeals (Appendix to Petitioner's Brief, Pages 39-40). The Supreme Court of Texas is unauthorized to review questions of law not raised in Motion for Rehearing in the Court of Civil Appeals. *Stephenson* v. *Miller-Link Lumber Company*, Commission of Appeals of

Texas, 277 S.W. 1039; *Smith* v. *Brazoria County*, 115 Texas 148, 278 S.W. 177. On Writ of Error to the Court of Civil Appeals, the Supreme Court of Texas has jurisdiction to determine only questions which were properly before the Court of Civil Appeals. *Wisdom* v. *Smith*, 146 Texas 420, 209 S.W. 2d 164. Petitioner-Defendant attempted to assign the error in the Supreme Court: "Second Point—The Authority Granted to the Petitioner by the United States Was Not Exceeded and According to Law Petitioner is Immune from Liability". There is no assignment in the Motion for Rehearing before the Court of Civil Appeals attacking the fact findings of that court and the fact findings of the jury, to the effect that the authority granted to Petitioner in the contract with the United States was exceeded and that Petitioner-Defendant was guilty of negligent acts which were a proximate cause of the damage. In other words, Petitioner-Defendant, although it did not attack the findings of the jury in the Court of Civil Appeals on the sufficiency of the evidence, and thereby could not attack such findings in the Supreme Court of Texas, continues to argue the factual matters found against it by the jury and the Court of Civil Appeals to the effect that the authority granted to the Petitioner-Defendant Federal contractor by the United States was exceeded and that it deposited material which included spoil and salt water in a place on the Respondents' property not provided in its Federal contract.

The Supreme Court of the United States will not review a state court judgment based upon an adequate and independent non-Federal ground, even though a Federal question be involved and perhaps wrongfully decided. *Murdock* v. *Memphis*, 20 Wall. 590, 636; *Berea College* v. *Kentucky*, 211 U.S. 45, 29 S.Ct.R. 33. Where a non-Federal ground is raised in the record which may be found ade-

quate to support it the presumption is that the court decided the case on a non-Federal ground. Jurisdiction will thus be declined. *Lynch* v. *New York ex rel. Pierson*, 293 U.S. 52, 54-55, 55 S.Ct.R. 16; *Adams* v. *Russell*, 229 U.S. 353, 33 S.Ct.R. 846. Where the Supreme Court of Texas, the highest court of the state, delivered no opinion and it appears that the judgment may have rested on a non-Federal ground, the Supreme Court of the United States will not take jurisdiction to review the judgment. *Stembridge* v. *State of Georgia*, 343 U.S. 541, 547, 72 S.Ct. 834, 837; *Durley* v. *Mayo*, 351 U.S. 282, 76 S.Ct. 806, 809.

Since this case was tried by a jury in a state court and the findings of the jury were not attacked by the Petitioner-Defendant on the sufficiency of the evidence or without support in the evidence, and the Court of Civil Appeals of Texas found in its opinion that such findings of the jury were supported by the evidence, the Seventh Amendment to the Constitution,[1] prevents the Supreme Court of the United States from retrying the facts. The Supreme Court will not exert its jurisdiction merely to review a decision of a state court upon a question of fact. It is submitted that this Court does not have jurisdiction and that the Petitioner's Application for Writ of Certiorari should be dismissed.

QUESTIONS PRESENTED.

Petitioner asserts there are seven questions presented, but Respondent would show that the only points raised on

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[1]Article VII—Amendment to U. S. Constitution: In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

appeal to the Court of Civil Appeals which are raised here are: First Point, that the trial court erred in failing to recognize defendant's defenses that the plaintiffs had previously given the United States Government the right-of-way and easement to do the very things made the basis of this suit—to dump spoil on the lands of the plaintiffs in the area involved in this suit; Second Point, that the trial court erred when it refused to rule that there could be no recovery from defendant contractor because the acts complained of were legally authorized by the Government to improve navigation and such acts should be regarded as the acts of the Government and not the personal acts of the contractor.

The application for writ of error to the Supreme Court of Texas only asserted the point that where the landowner conveys to the United States a perpetual unrestricted easement to deposit dredged material upon his land, then neither the landowner nor his tenants have a legal right to sue a contractor, dredging a public waterway under the supervision of the United States, for damages resulting from the deposit of dredged material upon land covered by the easement. The second point attempted to be presented to the Supreme Court but not assigned on motion for rehearing was that the authority granted to Petitioner-Contractor by the United States was not exceeded.

In each of the points presented to the Court of Civil Appeals and the Supreme Court of Texas, as well as in the questions presented in the petition for Writ of Certiorari, Petitioner-Defendant refuses to recognize the findings of the jury and the findings of the Court of Civil Appeals that it deposited material in a place on Respondents' property not provided in its Federal contract for deposit of material, that it negligently deposited material, which included spoil and salt water, in Respondents' fresh water

canal where the Government contract provided that no material should be allowed to enter such canal; that Appellant was negligent in the performance of its contract and exceeded the authority granted and the directions given in its contract with the Government. The Court of Civil Appeals expressly held that the acts complained of were done in a negligent and willful manner, outside of the provisions and directions in the contract itself.[1] (Appendix to Petitioner's Brief, Page 48).

In each of the questions presented by Petitioner it is assumed that it did not deposit spoil in places not provided for in its contract with the United States and that it did not exceed the authority granted in such contract.

Question No. 2 in Petitioner's Brief was not raised or presented in the Court of Civil Appeals or the Supreme Court and it seeks to disregard the limitations placed upon the deposit of spoil in its contract with the United States. In regard to the Sixth Point, the question of admiralty jurisdiction and the question of whether the District Court of the United States erred in remanding the case, was not presented to the trial court nor was it assigned as error on appeal to either the Court of Civil Appeals or the Su-

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[1]The Court of Civil Appeals in its opinion (Appendix to Petitioner's Brief, Page 48) comments:

> "The Appellant here had the right under the easement and his Government contract to dump spoil with impunity on the lands of Appellees, only at such places as his contract directed him to dump it. When it placed spoil at any other place, such act was not the act of the Government but was Appellant's own act, for which it is liable.
>
> "We think the evidence supports the findings of the jury that the Appellant was negligent in the performance of his contract and exceeded [illegible] authority granted and directions given in its contract with the Government. *It is noted that in none of its points of error on appeal does the Appellant complain of the sufficiency of the evidence in any way* * * *." (Italics ours).

preme Court (Appendix to Petitioner's Brief, p. 39; Appendix this Reply, p. A9).

REPLY TO PETITIONER'S STATEMENT AS TO "HOW QUESTIONS WERE RAISED."

Respondents refer to its discussion under "Jurisdiction" and "Questions Presented" of this reply, to show the only points raised by Petitioner on appeal before the Court of Civil Appeals and Texas Supreme Court.

The question of jurisdiction or removal was not assigned on appeal or presented to the State District Court, the Court of Civil Appeals or The Supreme Court of Texas.

Special exceptions were not presented to or ruled on by the trial court (Opinion Court Civil Appeals—Appendix to Petitioner's Brief, Page 35).

Any error in the trial court's ruling on Motion for Summary Judgment that fact issues existed was not assigned on appeal.

RESPONDENTS' COUNTERPOINTS.

1. The jury having found from the evidence that Petitioner-Defendant, Bauer-Smith Dredging Company, deposited material, which included spoil and salt water, on July 18, 19 and 20 in a place on Respondents' property not provided in its Federal contract for deposit of material, and in Respondents' fresh water canal where the plat attached to the contract provides: "No material shall be allowed to enter this canal", and having further found that Petitioner was guilty of acts of negligence which were a proximate cause of the damage, as well as the intentional, willful and deliberate acts of Petitioner's vice-principal.

and the Court of Civil Appeals having found such findings supported by the evidence, the contract with the United States did not present a defense to such action for damages under the law of Texas.

2. Petitioner-Defendant dredging contractor was liable under the law of Texas for damages to Respondents' rice crop, leasehold and freehold proximately caused by the negligence or wrongful acts or omissions and deliberate, willful action and failure to act the same as any other private person; and the contract with the United States provided no defense or immunity to Respondents' action for damages where the dredging contractor exceeded its authority granted in the contract and negligently performed the contract. Further, the Government contract, Section 11, provides that: "Contractor shall * * * be responsible for all damage to persons or property that occur as a result of his own fault or negligence in connection with the prosecution of the work, * * *". (Statement of Facts, Volume 3, the third page following Page 702, Original Def. Ex. 3).

3. Respondents-Plaintiffs' petition stated a cause of action against Petitioner-Defendant based on negligence and willful acts under Texas law, and the Petitioner-Defendant having offered the Government contract in defense to such action under a plea of general denial, the burden was on the defendant to prove that the acts complained of were performed within the authorization of the contract—the findings of the jury and the undisputed evidence that material, including spoil and salt water, was deposited in the fresh water canal where it was expressly provided that no material should be allowed to enter such canal, establish that the acts complained of were outside of the contract and in violation of the rights and privileges granted by the Government to the contractor.

4. Respondents-Plaintiffs were not parties to the contract between the United States and Petitioner-Defendant and were therefore not bound by any settlement procedures therein contained, and to hold that acceptance of the work by the contracting officer of the United States or his subordinate at a time when a claim for damages was being asserted by Respondents-Plaintiffs against the Petitioner-Defendant is a bar to any action against the contractor would deprive Respondents of their Constitutional rights to a trial of the facts by jury, and would deprive Respondents-Plaintiffs of their property without due process of law.

STATEMENT.

This was a suit in the District Court of Texas by Respondents against Petitioner, Bauer-Smith Dredging Company, for damages proximately caused to Respondents' rice crop on or about July 18, 19 and 20, 1952, by negligence and willful, deliberate and malicious acts of Petitioner. All parties were residents of Texas. Trial was to a jury and judgment was entered on the verdict of the jury (Appendix to Petitioner's Brief, pp. 5-24).

Petitioner-Defendant filed a general denial to the action for damages, and sought to recover of Roy Tully and L. W. Tully, the rice farmers, $5,000.00 expended by it in an effort to minimize and mitigate the damages to the rice crop (Appendix to this reply, p. A1; Transcript p. 20).

Claim was made by Respondents against Petitioner for damages on July 21, 1952, by letter which was acknowledged by Petitioner on July 25, 1952 (Statement of Facts 685, 640, 643, 668). Subsequent to this date and before the date of the certificate of completion signed by Glen F.

Egan, resident engineer, not the contracting officer of the United States. Petitioner expended $5,000.00 to mitigate damages to the rice crop. This same resident engineer testified he had gone to the scene of the damage and that if any damage resulted from the deposit of spoil in the lead ditch or canal in violation of the terms of the contract, it was the responsibility of the dredging company, and when they failed to put up dikes or take means to prevent this, the contractor took the risk and had to accept the consequences (Statement of Facts, p. 411).

The contracting officer did not have any notice of the Tully claim against Bauer-Smith being outstanding at the time he approved the final payment, and he testified that he had no jurisdiction to release Bauer-Smith from any damages to property that occurred as a result of their fault, or negligence (Statement of Facts, 586-587; 589).[1]

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[1]Excerpt from testimony of Colonel Lang, the contracting officer (S. F. 586):

"Q. The only thing that you, as the contracting officer, were interested in, on behalf of the U. S. Army Engineers was the clearance of the channel, wasn't it?

A. I would say the thing we were interested in was the performance of the work called for in the plans and specifications, which primarily dealt with the clearance of the channel and the depositing of the material in certain areas.

Q. All right, sir. Now you didn't undertake to release Bauer-Smith Dredging Company from any responsibility for the damages to property that occurred as a result of their fault, or negligence, did you?

A. I would say, that is something that I didn't have any jurisdiction over (S. F. 586-587)

Q. Well, now I believe you said, if I understood you correctly, that you didn't have any notice of this claim outstanding at the time you approved this payment?

A. That is correct.

Q. And then you did not attempt to judge the merits of this claim at that time, did you? You didn't have any notice about it?

A. No, sir.

Q. Sir?

A. I didn't know there was a claim." (S. F. 589).

Upon the trial Petitioner-Defendant offered in defense its contract with the United States, Department of the Army (Defendant's Original Exhibit 3). This contract provided:

> "The contractor shall take such precautions, including the construction of new levees and/or repair or raising of old levees, if deemed necessary to prevent spoil or waste from flowing beyond the limits of the spoil disposal area. * * * If any material shall enter a drainage outlet, it shall be promptly removed by the contractor at his expense. No material shall be allowed to enter any existing slip or small boat basin.
>
> "(d) When the material is deposited in confined areas, all embankments or bulkheads needed for confining or grading the material, with waste weirs, shall be provided and maintained by the contractor, and the cost thereof included in the contract price.
>
> "(f) Any material that is deposited elsewhere than in places designated or approved by the contracting officer will not be paid for, and the contractor may be required to remove such material and deposit it where directed at his expense.
>
> * * *
>
> "11. Permits and Responsibility for Work. The contractor shall, without additional expense to the Government, obtain all required licenses and permits and *be responsible for all damages to persons or property that occur as a result of his own fault or negligence in connection with the prosecution of the work*, * * *." (S. F. Vol. 3, the 3rd page following page 702; Defendants' Original Exhibit 3).

Certain drawings were made a part of the contract by reference and on Sheet 5, which shows the McFaddin Trust lands, is shown a canal (Respondents' fresh water canal and lead ditch which was a part of Tully's irrigation system), with a notation on the drawing: "No material shall be al-

lowed to enter this canal". There was evidence in the record from District Engineer Egan to the effect that the word "material" included salt water and spoil. It is undisputed that the dredging company permitted salt water and spoil to enter this canal, and there was testimony that the spoil and salt water in the canal extended a distance of a mile from the Intracoastal Canal (S. F. 76).

On July 18, 1952, about 4:30 P. M., Respondent, L. W. Tully, saw that Petitioner's dredge was pumping spoil and salt water into the fresh water canal and immediately notified Captain Ohlhausen of the dredge "Mansfield", the officer in charge, that the dredge was pumping spoil and salt water into his "lead ditch" which contained fresh water and was connected with his fresh water irrigation system. At that time L. W. Tully also informed Captain Ohlhausen that he had a fresh water reservoir adjacent to said lead ditch which was then being used to water his rice crop. Captain Ohlhausen informed the office of Petitioner at Port Lavaca, Texas, of these facts and he was instructed to turn the dredge so as to pump on the South side of the Canal, which was away from the fresh water canal and lead ditch and the fresh water reservoir.

On the morning of Saturday, July 19, 1952, the dredge superintendent, Clovis Duplechan, a vice-principal of Petitioner, gave orders to turn the dredge and pump spoil and salt water directly into the fresh water reservoir; prior to such turning and pumping Duplechan was told that such area within the bounds of the levees was a fresh water reservoir and was being used to water Respondents' rice crop. Nevertheless, with full knowledge that the dredge would be pumping spoil and salt water directly into Respondents' fresh water reservoir, and before the operation had begun, Superintendent Duplechan said that he didn't give a "damn", that he was giving the orders, and directed

the crew to pump the spoil and salt water into the reservoir. The jury found that the action by the superintendent was malicious, intentional and willful and awarded exemplary damages for such action.

The jury in response to special issues found the following: Special Issue 25: That Duplechan with knowledge of the existence of the fresh water reservoir before the dredge started pumping into it, willfully and intentionally ordered the pumping of spoil and salt water in the reservoir; Special Issue No. 28: That the defendant, its agents, servants and employees, were negligent in permitting the spoil and salt water to enter plaintiffs' fresh water canal and such was a proximate cause of the damages sustained by plaintiffs, Special Issue No. 30: That Tully notified defendant's agent, Ohlhausen, on July 18, 1952, of the existence of his fresh water reservoir; Special Issue No. 31: That defendant was negligent in pumping spoil and salt water into plaintiffs' fresh water reservoir after notice of its existence and that such negligence was a proximate cause; Special Issues Nos. 33 and 34: That defendant's superintendent, Duplechan, after being notified of the existence of the reservoir, was negligent in failing to inquire of the United States Army Engineers if it was proper to pump spoil and salt water into said reservoir; Special Issues 36 and 37: That Bauer-Smith Dredging Company, or its agents, knew or in the exercise of ordinary care should have known of the existence of plaintiffs' fresh water reservoir prior to pumping spoil and salt water into the reservoir on July 19, 1952, and that such act of pumping spoil and salt water was a proximate cause of the damage; Special Issue No. 38: That the defendant, Bauer-Smith Dredging Company, or its agents, knew or in the exercise of ordinary care should have known of the existence of plaintiffs' fresh water canal and lead ditch prior to per-

mitting spoil and salt water to enter said canal on or about July 18, 1952, and that such act of permitting spoil and salt water to enter said canal was a proximate cause of the damage. The Petitioner-Defendant requested Special Issues Nos. 40, 41, 42, 43, 44 and 45, and in answer thereto the jury found that Bauer-Smith deposited spoil on the North side of the Canal on July 18, 1952, July 19, 1952 and July 20, 1952, in a place not provided in its Federal contract for the deposit of material (See Appendix to Petitioner's Brief, Pages 14 through 22).

In the face of the foregoing findings, Petitioner makes the statement at Page 9 of his application to this Court: "The dredged material was deposited in accordance with the plans and specifications of the Federal Government". Respondents submit that this statement is incorrect. At no time on appeal to the Court of Civil Appeals or the Supreme Court did the Petitioner dredging company challenge the findings of the jury by any assignment of error.

Petitioner offered in evidence the easement granted to the United States by W. P. H. McFaddin, et al., over the objection of Respondents because such defense had not been pleaded (Pages 25 through 27, Petitioner's Application; Statement of Facts, Volume 3, Page 696). The quotation from this exhibit to Petitioner's Brief fails to quote the property description and fails to show the plats attached thereto as original exhibits, but the field notes limit the easement for canal purposes to a width of 300 feet for the purpose of constructing the Intracoastal Canal.

The land for actual construction of the Intracoastal Canal is shown on the plat (Statement of Facts 699); after the construction the remainder reverted to McFaddin Trust subject to the right of the United States to deposit spoil. The express reservation reads:

"Reserving, however, to the parties of the first part, their successors and assigns, all such rights and privileges in said tract or parcel of land as herein conveyed, and not converted into public navigable waters as may be used and enjoyed without interfering with or abridging the rights and easements herein conveyed to the party of the second part."

This referred to the tract or parcel of land therein conveyed and described by field notes and not to the lands adjacent on which the United States had a right to deposit dredged material "in a careful and prudent manner".

The instrument further expressly provides:

"The parties of the first part do hereby waive and release the United States of America, its officers agents, servants, and *contractors from any and all claims for damages which may result from the careful and prudent construction and maintenance of the waterway, and the deposit of spoil or other matter as hereinbefore stated in a careful manner;* * * *." (S.F. 694-697) (Emphasis ours).

The Petitioner in his argument has conveniently overlooked the express terms of the easement which imposes an express duty on contractors to deposit spoil in a careful manner.

In other words, McFaddin *et al.* conveyed a well defined easement to the United States for the construction of the waterway but reserved all such rights and privileges in that part of the tract not converted into public navigable waters as could be used by them without interfering with the rights and easements conveyed to the United States. The United States obligated itself to deposit spoil on the land within the easement conveyed and on the adjoining lands of grantors in a careful manner and Grantors released all claim for damages which may result from careful and prudent maintenance of the waterway.

There was testimony that the lead ditch was filled with spoil and muck for a distance of one mile, and at a distance of one-half mile from the Intracoastal Canal the silt, spoil and muck was 18 inches to 2 feet in depth. The Court of Civil Appeals expressly held that Petitioner contractor exceeded the authority granted and directions given in its contract with the government, and was therefore liable for its acts. (See Note Page 8 of this reply).

The Intracoastal Canal was constructed in 1930 or 1932 and the first general dredging for maintenance was about 1942, and the next time of maintenance dredging was some ten years later in 1952. The United States had an easement for the deposit of spoil on the McFaddin lands on the North side of the Intracoastal Canal adjacent to the fresh water reservoir on T. & N. O. Survey 347 and on the South side of the Canal on Section 4 (Statement of Facts 583 witness, Colonel Lang).

The area engineer, Egan, stated it was well known in the dredging business that where you pumped spoil and salt water out of a dredging pipe the velocity of the water will cause it to flow for a considerable distance, carry silt or fine particles which are suspended in it (Statement of Facts 326). Regarding the performance of the provision of the contract requiring that no material be permitted to enter the canal, Egan, the area engineer, testified that it was the responsibility of the contracting party to keep it out but he had the option of disobeying it if he saw fit and was willing to accept the consequences. Engineer Egan also testified the terminology "material" was placed on the plat under his direction, and when he was talking about dredged material he was talking about the combination of dredged material and carrying water (Statement of Facts 368).

Engineer Egan further testified:

"Q. When you put that remark on that chart was it your intention to keep salt water from getting into that ditch, or were you referring to solids?

A. My intention was to put a provision so that if any damage or undesirable effects occurred to that ditch during dredging operations, that there would be grounds for requiring corrective action (S. F. 409): * * * Of course, where there is a big property loss, we do then have the basis for requiring corrective action." (S. F. 411).

Bauer-Smith took no precautions to keep spoil and salt water out of the "canal" (the fresh water canal and lead ditch) (Statement of Facts 497).

Petitioner continually makes statements in its application which are not supported by the record. For example, on Page 8, the statement is made that: "All dredged material was deposited upon the easement granted to the United States by Respondents and in the area designated by Federal engineers". This statement is not correct and it is sufficient to say that the findings of the jury, which the Court finds were supported by the evidence, are to the contrary. Again, on Page 12, Petitioner makes the statement to the effect that it was a discretionary act to avoid depositing dredged material in the fresh water canal and lead ditch. The Government plat expressly states that "no material shall be allowed to enter this canal". Again, on Page 15, Petitioner makes the statement that there was no evidence that Petitioner "exceeded the authority" granted to it in the contract. This is an irresponsible statement in view of the undisputed evidence that spoil and salt water did enter the canal and lead ditch, where the contract expressly provided that no material was to be deposited there.

The Government was required under its easement to deposit spoil on the limits of the canal right-of-way, as well as on the adjacent lands of Respondents, in a careful and prudent manner. The Government made its contract with the dredging company and provided certain protections to the landowner, and also provided in its contract with the dredging company that the dredging company would be responsible for all damages to persons or property that occurred as a result of their own fault or negligence in connection with the prosecution of the work. Further, the Government contract provided that the contractor should take precautions, including the construction of new levees if deemed necessary to prevent spoil or waste from flowing beyond the limits of the spoil disposal area.

ARGUMENT.

Petitioner asserts that its contract with the United States is a complete defense to any action for damages based upon negligence and based upon the fact that it exceeded the authority granted in its contract with the United States and negligently deposited spoil and salt water in places not provided for in the Government contract. It is undisputed in this record that on July 18, 1952, L. W. Tully saw the defendant's dredge pumping spoil and salt water into the fresh water canal which was in fact connected with his rice reservoir system. The spoil and muck was about 18 inches deep in the canal for about a distance of a mile. Petitioner-Defendant, by the very terms of its contract, was not permitted to "allow any material to enter this canal". Egan, the area engineer, testified it was the responsibility of the contracting party to keep it out but he had the option of disobeying it if he saw fit and was willing to accept the consequences. The con-

tractor took no precautions to keep spoil and salt water out of this canal. The jury, as well as the Court of Civil Appeals, has found these facts, that is, that the Petitioner-Defendant was negligent in the performance of its contract and exceeded the authority granted and the directions given in its contract with the Government.

Where an agent or officer of the Government purporting to act on its behalf exceeds his authority, he is personally responsible. *Yearsley* v. *W. A. Ross Construction Company*, 309 U.S. 18, 60 S.Ct.R. 413, 414; *Converse* v. *Portsmouth Cotton Oil Refining Company*, 218 Fed. 981, 4th Circuit; *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682, 69 S.Ct.R. 1457; *Nakasheff* v. *Continental Insurance Company*, 89 Fed. Supp. 87, U.S. District Court New York 1950.

In *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682, 687, 689, the Court says:

> "There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign. * * * On a similar theory, where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are ultra vires his authority and therefore may be made the object of specific relief. It is important to note that in such cases the relief can be granted, without impleading the sovereign, only because of the officer's lack of delegated power."

Again, in the Larson case Justice Frankfurter further reviews cases involving liability of the official or agent based on the commission of a common law tort, and at Pages 717, 718, says:

"While there was some talk in the Lee opinion, as well as in some of the cases which followed that decision, about taking property without compensation, the basis of the action was that the defendants were ordinary tortfeasors, not immunized for their wrongful invasion of the plaintiff's property by the fact that they claimed to have acted on behalf of the Government."

* * *

"In each of these cases this Court sanctioned a suit against an officer of the Government merely because the officer misconceived the facts, or misapplied the legal principles, on which rested the plaintiff's right 'under general law to recover possession of specific property wrongfully withheld'. Land v. Dollar, supra, 330 U.S. at page 736, 67 S.Ct. at page 1011, 91 L.Ed. 1209. Under such circumstances an officer acquires no immunity even though he committed a tort while attempting to discharge what would be his duty if he were correct on his assumption as to the ownership of the property or as to the right to its possession under the legal instruments governing the transaction. * * *"

In *Converse* v. *Portsmouth Cotton Oil Refining Company*, 281 Fed. 981, 4th Circuit, a harbor dredging contract with the United States required the contractor to make arrangements for disposing of the dredged material and provided the contractor should be responsible for any damages which might result from such operations. The contractor contended that the damages were incidental to the performance of the work and therefore no liability resulted. The court pointed out that this rule of consequential damage does not apply where the work can be done without inflicting the injury, and in that case said:

"It follows that they are liable to complainant for the injury found to have been caused by their wrongful acts and cannot claim immunity on the ground that

they were 'doing government work under government directions'. For as respects the matter in dispute—the disposition of dredged material—the 'work' to be done was in reality a private enterprise and the only 'directions' were that defendant should make adequate provisions for retaining the material in the area of deposit, and be answerable to 'property owners and others' for all the consequences of their failure to do so, and to this they expressly agreed. This is not saying that the contract itself gives complainant a right of action, but that it does serve to defeat the claim of non-liability because made with the government. It is only repeating to add that the whole defense in this case rests on the assumption that defendants are not liable for the injury suffered by complainant because they were engaged in the performance of a government contract. That assumption is clearly erroneous, in our judgment, when the injury is at once unnecessary and easily avoidable, and especially when, as here, the contractor has expressly agreed to be responsible for any damage to 'property owners or others' which may result from his operations."

As applied to the instant case, the jury found that Bauer-Smith deposited spoil and salt water in places not provided for in the contract and that it was negligent in the performance of the work. It was provided that no material should be allowed to enter the canal which was Respondents' fresh water canal and lead ditch; the contract provided that the contractor should take the precautions, including the construction of new levees, etc., if deemed necessary to prevent spoil and salt water flowing beyond the limits of the spoil disposal area. Thus, the very provisions of the contract of Petitioner dredging company with the United States served to defeat the claim of non-liability. The contractor must take the contract according to its terms and if it exceeds the authority granted in the contract it cannot hide behind the defense that this is a Gov-

ernment contract. Further, the contract expressly provided that Bauer-Smith would be responsible for all damages to persons or property that occurred as a result of its own fault or negligence in connection with the prosecution of the work. Again, this expresses the intention of the Government that the contractor was to be responsible for its negligent acts and acts outside of those authorized under the contract, and it defeats the claim of non-liability under performance of the contract.

In considering the argument of Petitioner, we call the Court's attention to the recent cases of *Indian Towing Company* v. *United States*, 350 U.S. 61, 100 L.Ed. 48, 78 S.Ct.R. 122; and *Rayonier, Inc.*, v. *United States*, 352 U.S. 315, 1 L.Ed.2d 354, 77 S.Ct.R. 374, which hold that the liability of the Federal Government for negligent acts under the Federal Tort Claims Act is not restricted to the liability of a municipal corporation on the basis of a distinction between negligence in a "proprietary capacity" and negligence in a "governmental capacity", but the rule for determining liability of the United States is whether a private person would be responsible for similar negligence under the laws of the state where the acts occurred. The Supreme Court was likewise not impressed by the government's argument that the decision might impose a heavy burden on the Federal Treasury, stating:

> "* * * Congress, believing it to be in the best interests of the nation, saw fit to impose liability on the United States in the Tort Claims Act. * * * Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the government, and the resulting burden on each tax-payer is relatively slight. But when the entire burden falls on the injured party it might leave him destitute or grievously harmed."

In *Gulf Refining Company* v. *Walker & Son*, 124 F. 2d 420, 425, 630, 6th Cir., the rule is recognized that immunity under a government contract does not extend to liability for damages which result from the contractor's negligence.

The Supreme Court of Texas recognizes the rule that a contractor is liable to third parties for negligence in the performance of the work. *Glade* v. *Dietert*, Tex. S. Ct. 295 S.W. 2d 642; *City of Amarillo* v. *Gray and Stockton*, Tex. S. C., 310 S.W. 2d 737 (Cases not yet reported in Texas Reports). Likewise a municipal corporation is liable for the negligence of its agents. *City of Amarillo* v. *Gray and Stockton, supra.*

A duty existed at common law running from the defendant contractor to Tully et al. to exercise due care not to injure their leasehold and improvements. In reality the work was a private enterprise for a profit. The responsibility for the performance of the contract according to its terms was assumed by Bauer-Smith; the responsibility for building levees, etc., to retain spoil and salt water was assumed by Bauer-Smith; the contract also provided that Bauer-Smith would be responsible for all damages that occurred as a result of his own fault or negligence in connection with the prosecution of the work.

According to the great weight of authority, a contractor with a public body is not entitled to avail himself of the immunity of the latter from liability for injuries resulting from negligence in the performance of public work. 69 A.L.R. 492; *Thompson* v. *Caldwell*, C.C.A. 4th, 294 Fed. 145 (Ky.); *Wade* v. *Gray*, 104 Miss. 151, 61 So. 168; *Foohey Dredging Company* v. *Mabin*, 118 Ark. 1, 175 S.W. 400, etc.; *Converse* v. *Portsmouth Cotton Oil Refining Corporation*, (C.C.A. 4th) 281 Fed. 981 (cert. denied 260 U.S. 724, 43 S.Ct.R. 13); *United States Use of Carnegie Institute* v. *C. A.*

Riffle Company, 247 Fed. 374, District Ct. W. Dist. Pa. In the latter case a contractor with the United States government was said to be liable to a third person on account of injuries to the latter's building caused by the negligence of the contractor in blasting where the contract provided that the contractor should be "responsible for all damages to persons or property which may occur in connection with the prosecution of the contract".

Recent cases recognizing the rule of liability of a government or municipal contractor for negligent performance are: *Tillotson* v. *F.*, 160 Kan. 81, 159 P. 2d 471; *Gilbert* v. *N. M. C. Company*, 39 N.M. 216, 44 P. 2d 489, holding a paving contractor with the city who negligently broke a water main liable for a fire loss caused by low water pressure; *Bluhm* v. *B. & G.*, 62 Ohio App. 451, 24 N.E. 2d 615, holding that a contractor for a city sewer project could not plead he was performing a governmental function in defense to an action for damages resulting from blasting. The contract with the city provided that defendant assumed liability for damages to persons or property by blasting operations, etc., due to improper, illegal or negligent conduct of the contractor.

Petitioner cites *House* v. *Houston Waterworks Company*, 88 Tex. 233, stating that the duty Respondents-Plaintiffs seek to create cannot be based on the Government contract. This is an unusual case on the facts but a quotation from Page 241 demonstrates that the case recognizes the principle of law asserted by Respondents here.

> "* * * The true question always is, has the defendant committed a breach of duty apart from the contract? If he has committed a breach of the contract, he is liable only to those with whom he has contracted, but if he has committed a breach of duty, he

is not protected by setting up a contract in respect to the same matter with another."

In *Atchley* v. *Tennesee Valley Authority*, 69 Fed. Supp. 952, cited by Petitioner, damages were sought for the destruction of crops as a result of a flood on the Tennessee River, the lands of plaintiff being adjacent to waters impounded by defendant. In this case the Court said that the real complaint was as to the manner in which Government discretion had been exercised and "there is no suggestion in the affidavits of any action on the part of the defendant which could properly be described as willful and wanton".

Petitioner asserts that the Court of Civil Appeals in its opinion held that the United States itself had the right to dump spoil and dredged material on the McFaddin lands involved in this suit, and the right of way easement and grant would therefore be a defense in law to a suit of Respondents-Plaintiffs in a suit against the United States. The government was not a party to this suit, the construction of the easement and grant was not necessary to a decision, and this expression of the Court was nothing more than dictum—which it was not necessary for Respondent to challenge since the judgment was affirmed and no judgment was sought against the United States.

Respondents-Plaintiffs do not agree that this statement of the law as applied to the facts is correct. The proper rule for determining liability of the United States under the Tort Claims Act is whether a private person would be responsible under the law of the state where the acts occurred. *Rayonier, Inc.*, v. *United States*, 352 U.S. 315, 1 L.Ed.2d 354, 77 S.Ct.R. 374; *Indian Towing Company* v. *United States*, 350 U.S. 61, 100 L. Ed. 48, 76 S.Ct.R. 122.

The easement granted to the United States reserved to McFaddin and its assigns the right to possession of the lands

within the field notes of the land conveyed and not converted into public navigable waters, subject to the right of the United States to deposit spoil in a careful and prudent manner, and the McFaddin Trust owned the adjoining lands in fee subject to the right of the United States to deposit spoil or other material in a careful and prudent manner. Respondents-Plaintiffs were therefore legally in rightful and lawful possession of the lands covered by the Tully lease at the time of the occurrences. There is an implied if not an express agreement with the United States that the United States, its agents and contractors, would be liable for damages resulting from a careless or negligent maintenance of the waterway and from deposit of spoil in a manner which was not careful and prudent or which was negligent.

Aside from the express provisions of the easement, the law in Texas is that although the United States (considered as a private citizen) had the dominant estate in part of the land under the easement, the exercise of such right must be done in a careful and prudent manner, reasonably exercised as against the lawful possession of the servient estate. *Shell Petroleum Company* v. *Liberty Gravel and Sand Company*, 128 S.W. 2d 471, Tex. Ct. Civ. App., Bmt.; *Humble Oil and Refining Company* v. *L. & G. Oil Company*, 259 S.W. 2d 933, Ct. Civ. App. error refused no reversible error; *Warren Petroleum Company* v. *Martin*, 153 Tex. 466, 271 S.W. 2d 410. Further, it was necessary for the holder of the dominant estate to plead in defense that he exercised his superior right as against the servient estate with due care. *Southern Pine Lumber Company* v. *Smith*, error refused without merit, Ct. Civ. App. Tex., 183 S.W. 2d 471, 472, and other Texas cases above cited. This, Petitioner-Defendant did not do.

Neither the United States nor its contractor had the arbitrary right to pump spoil and salt water into a fresh water reservoir regardless of consequences where Respondents were rightfully in possession. 41 Tex. Juris. 409, Para. 2, Trespass; 41 Tex. Juris. 413, Para. 6; *Shell Petroleum Corporation* v. *Liberty Gravel and Sand Company, supra.*

The contractor was given whatever rights and privileges he had under the terms of his contract with the United States; he urged this as a defense; that his acts were authorized by the United States. The facts and findings of the jury that Petitioner exceeded the authority granted in this contract; that he was guilty of negligence which proximately caused Respondents' damage; that he willfully and deliberately injured Respondents after notice destroy his only defense that he was authorized by the United States and did these acts pursuant to authority granted by the United States. The United States carefully provided that the contractor would be responsible for damages to property that occur as a result of his own fault or negligence in connection with the prosecution of the work. The Petitioner-Contractor took a short cut, was guilty of negligence and willful acts which proximately caused Respondents' damage.

Even if the contractor were not limited by the terms of his contract, he was required, as was the United States, to exercise the right of entry with due regard to the rights of lessees Tully, who was lawfully in possession and within the limitations of the easement which required deposit of spoil in a careful manner.

At common law in Texas the government contractor was liable for damages resulting from his own fault and resulting from his negligences. The work could have been done without injury to Respondents; the Petitioner-Con-

tractor cannot claim immunity to an action for damages when it is undisputed that the depositing of spoil and salt water in the fresh water canal was not in accordance with the government contract but in express violation thereof. These facts served to defeat the claim of non-liability. *Converse* v. *Portsmouth Cotton Oil and Refining Co.*, 281 Fed. 981 (4th Cir.).

The National Association of River and Harbor Contractors have filed application to intervene, and brief subject to such motion. This motion and brief *Amicus Curiae* assumes compliance by Petitioner-Defendant with all conditions in the contract, and thus seeks with a stroke of the "pen" to destroy the findings of the jury and the Court of Civil Appeals that the dredging company was negligent and exceeded the authority granted by the United States. Spoil and salt water was deposited in places outside of those designated in the contract plans and specifications.

Intervenor states that the United States had the right under the easement to deposit dredged material exactly where Petitioner did deposit it. This was a fact not in issue on the trial as the United States was not a party, but its agents and contracting officers, and resident engineer testified the United States *would not* have deposited spoil and salt water into the reservoir after notice of its existence, but would have deposited it elsewhere. A vice-principal of Bauer-Smith willfully and deliberately ordered the pumping of spoil into the reservoir after notice of its existence and use. Further, the United States placed certain restrictions on the contractor in the plans and specifications.

The River and Harbor contractors further argue that the United States "authorized" the dredging company, its agent, to deposit spoil in the lead ditch, and in the reservoir

where it was deposited. This is not true, and contrary to the findings of the jury which were not challenged. The United States did not authorize the deposit of spoil (material and salt water) in the fresh water canal, but expressly provided "no material shall be allowed to enter this canal." Petitioner-Defendant took no precautions but deliberately permitted spoil and salt water to enter the "Canal".

The liability of Petitioner-Defendant was based upon negligence and deliberate and willful acts—all found by the jury and supported by the evidence. This Brief *Amicus Curiae* adds nothing and should be stricken because of the erroneous statements showing a disregard for the facts as shown by the record.

Another point is that Respondents-Plaintiffs are not parties to the dredging contract between the United States and Bauer-Smith, and therefore would have no cause of action against the United States on the contract, *United States* v. *Blair*, 321 U.S. 730, 64 S.Ct.R. 820, 824. Therefore, Respondent-Plaintiffs, who would have no cause of action on the contract as such, would not be bound as to any settlement procedure under the contract for settlement of disputes. Any certificate of formal acceptance of the work would not be binding upon a third party, *i. e.*, the Respondents. Further, the Contracting Officer had no notice of Respondents' claim and damage and did not purport to pass on the fact questions raised by such claim (Colonel Lang, Statement of Facts, pp. 586-589).

REPLY TO PETITIONER'S REASONS FOR GRANTING THE WRIT AND STATEMENT THAT THE CASE PRESENTS MATTERS OF FAR REACHING PUBLIC IMPORTANCE.

This is a suit for damages based upon negligence and willful acts of the defendant, between two Texas citizens, which was tried before a jury. The Government contractor defended on the basis that it had a Government dredging contract and that its acts were authorized by and were within the instructions given in the contract. This was defensive matter which raised issues of fact and it has been found by the jury, by the Court of Civil Appeals, and has also been demonstrated by the undisputed evidence that the Government contractor exceeded its authority and deposited spoil and salt water in places not provided for in the Federal contract for example, in the fresh water canal where the contract expressly stated: "No material shall be allowed to enter this canal". Under all the authorities, both Federal and the common law of Texas as decided by our Texas Supreme Court, the Respondents-Plaintiffs had a cause of action for damages and they established this before a jury. Petitioner made no attack on the findings of the jury in either the Court of Civil Appeals or the Supreme Court of Texas. The damage was unnecessary and would not have occurred had Petitioner complied with the Federal contract and had not Petitioner's vice-principal willfully and deliberately deposited spoil in the fresh water reservoir after notice of its existence and of the probable consequences of his act. In fact, the jury awarded $12,500.00 exemplary damages and this was affirmed by the Court of Civil Appeals, as well as the Supreme Court of Texas. It is doubted that another such case under the facts as presented here would ever arise. Under the de-

cision of this case and since it was solely a factual case, it does not present a matter of far reaching public importance. Petitioner seeks to concern itself with the fact that the United States may be required to reimburse Federal dredging contractors for damages paid to landowners and their tenants, but in the present case the United States expressly provided and Petitioner agreed to be responsible for any damage resulting from their negligent and willful acts in the performance of the contract. This argument is ruled out in *Rayonier, Inc., v. United States*, 352 U.S. 315. Further, had Petitioner any justiciable claim against the United States because of the claim by Respondents, Tully, *et al.*, for damages, it had expressly agreed in the contract with the United States as to the procedure for settlement. As far as this record is concerned no such claim was presented and had it been presented it would have been without merit because the Government contractor deposited spoil outside of the area provided for in its Government contract, and negligently and willfully inflicted damage on Respondents.

Had Respondents sued the United States based upon the negligence and the willful, deliberate and malicious acts of the contractor, the United States had a right of recovery and indemnity under the very terms of the contract. It was not the United States but the contractor who negligently performed and was liable.

It is respectfully submitted that this Petition for Writ of Certiorari should be denied.

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